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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANT

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Stephen Radich,

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REPLY BRIEF FOR APPELLANT

POINT I

Appellee's contention that the sculpture exhibited by appellant is not entitled to First Amendment protection.

Appellee contends that the First Amendment does not prohibit the conviction of appellant for exhibiting sculpture because the exhibition is "non-verbal," and therefore not speech but conduct, and, as conduct, is insufficiently communicative to be constitutionally protected.

Because the First Amendment refers to speech, appellee believes that sculpture—non-verbal art—may be censored.

The State thus ignores *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) in which this Court explicitly rejected the notion that the protection of the First Amendment was limited to verbal communication. In ruling that motion pictures were entitled to First Amendment protection, Mr. Justice Clark stated:

> "... the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment ... secures to any form of 'speech' or 'the press.'
>
> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas.
>
> • • • • •
>
> "... we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments...." 343 U.S. at 501-502.

Paraphrasing Mr. Justice Clark, it can hardly be doubted that painting and sculpture are significant media for the communication of ideas. Accordingly, they are squarely within the ambit of First Amendment protection and appellant's use of the flag in connection with his sculpture was an absolutely protected form of expression.

Appellee nonetheless contends that non-verbal art is within the First Amendment's orbit only if it has a sufficient communicative aspect. The exhibition of sculpture in issue here, the State argues, has only a minimal communicative element, first, because appellant's motive was commercial. Appellant testified that he displayed the sculp-

because they were works of art and because they for sale (Appellee's Brief, p. 22). But commercial ation is no justification for narrowing the protection pression secured by the First Amendment. *New York* s v. *Sullivan*, 376 U.S. 254, 265-266 (1964); *Smith* v. *rnia*, 361 U.S. 147, 150 (1959). Books, magazines, graphs and motion pictures are customarily for sale t or are in some way a source of income for those who ce or exhibit them. They do not for that reason lose Amendment protection. *Time, Inc.* v. *Hill*, 385 U.S. 1967); *Joseph Burstyn, Inc.* v. *Wilson, supra*, at 501; *ellis* v. *Ohio*, 378 U.S. 184 (1964).

e second basis for appellee's claim that the sculpture sufficiently communicative results from a misreading e testimony of appellant's expert witness, the Art Editor of the New York Times. The witness did not at he saw no discernible political or social comment work (Appellee's Brief, p. 23); he testified that the was protest art; that he was aware that the artist led to communicate a political anti-war message but is own interest in the exhibition was primarily es- (A. 110a, 106a, 109a). There has never been any on in this case about the communicative nature of sculptures, either in the trial court (A. 26a, 30a) or Court of Appeals (A. 9a, 16a).

entirely apart from whether it communicates a po- message, art work with esthetic value is protected e First Amendment. Cf. *Memoirs* v. *Massachusetts*, .S. 413 (1966); *Burstyn, Inc.* v. *Wilson, supra*. The al message projected by the work as protest art in it- arrants First Amendment protection. Moreover, even t a political message, a work of art utilizing a flag

motif would be entitled to First Amendment protection (see Nos. 13a, 15a in Appendix to this Reply Brief).

Appellee concedes that a political message is entitled to constitutional protection by proposing that this Court judge the sculpture by what it labels an "objective test" of the sufficiency of its communicative or expressive aspect. Under the test proposed, the First Amendment would only be applicable to "conduct," if a reasonable man, reasonably well informed, would understand the meaning intended. First Amendment protection would therefore depend on the success of the artist in projecting his message to the "reasonably informed man"; it would exclude messages meant only for a few. Not every reasonable man understands James Joyce or T. S. Eliot.[1]

The reasonable man would, according to defendant, understand the anti-war message of draft card burning better than that of the sculpture in issue here. He might also understand the meaning of destroying Selective Service records or bombing the Pentagon better than he would understand the paintings of Picasso.

Recognizing the communicative aspect of symbolic conduct is not, of course, the problem that this Court has faced in applying the First Amendment to symbolic conduct. The problem is whether or not regulation of the conduct is justified by a governmental interest unrelated to the suppression of free speech. *United States* v. *O'Brien*,

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[1] If such were the test what rational basis would there be for not applying the same test to the spoken word, so that only the more articulate speaker who can be understood by reasonable men, reasonably well informed, would be entitled to First Amendment protection?

391 U.S. 367 (1968). Appellee's proposed "objective test" ignores this.

We do not believe that this Court has ever withheld First Amendment protection from a work of art on the ground that its creation involved conduct which the government could regulate. Obscene writings, pictures and objects are outside First Amendment protection because they are found to utterly lack redeeming social value. Such a finding is, in effect, a finding that they are not art works. Cf. *Memoirs* v. *Massachusetts, supra.*

This is not a prosecution for obscenity, as the trial court recognized (A. 94a). It was not charged, or found, that the art work appealed to prurient interest. If the work had been prosecuted under an obscenity statute, a conviction would be invalid because all three criteria established by this Court for obscenity convictions are lacking.[1]

As we have stated in our main brief, we believe that art works are speech, and accordingly, *Street* v. *New York*, 394 U.S. 576 (1969) requires that appellant's conviction be overruled. The four governmental interests which might conceivably have been furthered by punishing Street were examined in the Court's opinion in that case. Those interests are relevant also where symbolic conduct rather than pure speech is involved (*United States* v. *O'Brien, supra;* See *Tinker* v. *Des Moines*, 393 U.S. 503 (1969)).

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[1] "[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs* v. *Massachusetts, supra*, at 418.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, —— F.2d —— (2d Cir., Slip Opn. 328 (12/24/70)) the Court of Appeals considered another subdivision of New York's flag statute, § 136(a) of the General Business Law (formerly Penal Law 1425, subdivision 16 (a)). This case involved the imposition of a peace symbol on what was claimed to be a representation of the flag. The unanimous opinion of that court by Lumbard, Ch. J. found that statute unconstitutional both on its face and as applied in that case because (1) traditional First Amendment activity might be swept within its ambit, (2) plaintiffs were using the flag as a means of expressing their views on a political issue, (3) the statute failed to provide enforcement officials with adequate guidance concerning what is proscribed and (4) it failed to afford adequate notice to the public of the scope of its proscription.

The Court described the question before it to be "whether non-verbal or visual communication involving the flag and flag alteration" is granted similar protection to the verbal communication at issue in *Street* v. *New York, supra.* To answer the question it applied the four governmental interests outlined in *Street* and found that none of them justified the prohibition of various political uses of the flag.[*]

Although appellee does argue that the flag desecration statute serves the second interest, an interest in preventing a breach of the peace, it relies largely on the fourth govern-

[*] Subdivision (d) of the statute was not before the court, but the opinion erroneously distinguishes between subdivisions (a) and (d) with respect to the first possible state interest: incitement of others to unlawful acts, citing only the decision of the New York Court of Appeals appealed from herein. The New York Court of Appeals did not rely on the first interest but on the second, and it made no distinction between the purpose of the subdivisions of the statute.

mental interest: assuring proper respect for our national emblem. Appellee's brief states again and again that the flag desecration statute serves to protect the integrity of the flag as a symbol of national unity (pp. 19, 23, 27, 31, 34). Appellant also believes that this is the interest served by the statute. However, we believe that this Court's ruling in *Street* v. *New York, supra,* at 593, that an interest in assuring respect for the flag has no place in a free society is equally applicable here. That interest is not unrelated to the suppression of free expression. See *United States* v. *O'Brien, supra,* at 377.

Appellee claims that such interest is unrelated to the suppression of free expression because the statute is neutral on political matters, banning the use of the flag by hawks as well as doves. This begs the point: the statute leaves Americans free to use the flag to praise the government's war policies, but prohibits them from using the flag to oppose those policies no matter what the grounds for their opposition—the pacifists' objection to the war itself, or the hawks' objection to the limitations of the war. *Cf. Schacht* v. *United States,* 398 U.S. 58 (1970).

Appellee seeks to distinguish the *Schacht* case on the ground that there is no valid governmental interest in protecting the military services from discredit. Assuming *arguendo* that there is less interest in protecting the military from discredit, the State's argument that the conviction of appellant can be sustained on the basis of the third interest referred to in *Street,* the interest in protecting the sensibilities of passers-by from shock and offense, would apply equally if the statute protected the military's symbols from contempt: a passerby to whom the flag "had special significance because of the loss of a relative in the Armed

Forces" (Appellee's Brief, p. 27) might well be more offended by seeing an anti-war street play in which an actor wore a military uniform, than by seeing the flag sculpture in appellant's second story gallery window.

Even if there may be circumstances where First Amendment protection could be denied because expression is forced upon a captive audience, this is not that case, and the statute is not narrowly drawn to encompass only such circumstances. There was no testimony that anyone other than the arresting officer saw the second story window of appellant's gallery, or would have seen it while passing by unless they stopped to look up.[4] The effigy in the window was not a separate basis for appellant's conviction at trial, and the trial court made no finding that the window display was more difficult to avoid than a sidewalk speaker. Nor did the Court of Appeals so suggest.

We submit that this Court may take judicial notice of the fact that a second story window display on New York City's Madison Avenue is not so obtrusive to those making their way through traffic on the street as to force them to change direction to avoid seeing it; if anyone did glance up, all he needed to do to avoid an image which was offensive to him would have been to redirect his eyes to the street level shops. This effort would be far less than what appellee states would be necessary to avoid the sidewalk speaker—"crossing the street or walking in a wide arc around the soapbox." (See Appellee's Brief, p. 27.) On the other hand, a finding that the sculpture in the window assaulted a "cap-

[4] In *Street*, the evidence at trial showed that there were some thirty persons on the corner near the flag and five to ten on the corner with appellant (394 U.S. at 578).

tive audience," would have to be based on evidence, and here there was none.

It is important to note that the question of assault on a captive audience was not raised by the State at the trial or on the prior appeals. The State offered no evidence of assault, nor did it argue on the trial or at any time until now that there was one. The case was tried by the State without any suggestion that the noose sculpture visible in the gallery window might be subject to condemnation for any different reason than the other sculptures; the trial court did not so find, nor did the Court of Appeals.

Moreover, an artistic work which offends passers-by, whether it be sculpture or drama, does not constitute "insulting or fighting words," condemned in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). Under the statute in *Chaplinsky,* epithets directed *at an individual* were prohibited. Such epithets are outside the protection of the First Amendment on the grounds that they are without social value, much as obscenity is outside that protection because it is utterly without redeeming social value. As has been stated above, this is not an obscenity prosecution; appellant was not charged with obscenity and could not have been charged with obscenity.

Finally, appellee attempts to justify appellant's conviction by relying upon its interest in suppressing highly controversial expressions of opinion which might provoke a hostile reaction, thereby endangering the public peace. However, the State's expectation that a breach of the peace may be reasonably expected to flow from casting contempt on the flag is negated by the fact that no evidence of a breach of the peace has been adduced in con-

nection with any of the numerous prosecutions which have arisen under the statute. Conduct protected by the First Amendment cannot be prohibited as "inherently dangerous" because of fear of a potentially hostile audience.[5] *Cox v. Louisiana*, 379 U.S. 536, 550 (1965).

Appellee appears to believe that one element of an art work may be isolated from the work as a whole as a subject for censorship. As alternative materials and symbols are available to artists, the State believes that it may require them to eschew those which they have chosen. However, no distinction can be made in an art form between the message and the medium. In the Morrel sculptures, as in most art works, the mode of idea transmission is inextricably intertwined with the idea itself. As Judge Fuld noted in his dissent below:

> "In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed instead, through the medium of sculpture." 26 N.Y.2d at 127-128 (A. 20a).

Accordingly, in the *Schacht* case, the actor was not told that he could not wear a military uniform because he had an alternate way of making his anti-war point.

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[5] Contemporary music could be banned under the theories advanced by the State of New York in its brief. Musical performances have caused riots: the first performance of Stravinsky's Rites of Spring caused a riot in the audience on account of the "uncompromising harshness and violence of its entirely novel idiom." Groves Dictionary of Music & Musicians, St. Martins Press, 5th Edition, Vol. VIII p. 138.

We believe that a free society cannot afford to censor art on the ground that it is disturbing or offensive. Art can never threaten the strength of democracy.[6] Novels, dramas, paintings, sculpture and poems are essential to education for self-government.[7]

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[6] See *The Governor Lectures on Art*, The New York Times Magazine (Apr. 1967), p. 28, where Nelson A. Rockefeller describes a meeting he and others had with Henry Luce, late publisher of Time, Life and Fortune magazines, who had expressed concern that modern art was threatening the strength of democracy. Rockefeller reports:

"The fascinating thing about this experience is that we ended up the evening with Harry being convinced that modern forms of artistic expression were the only area left in democracy where there was true freedom, where you had absolute freedom and there were no holds barred. He went from a deep concern that modern art was a destructive force, to the conclusion it was one of the great areas of freedom, one of the bastions of freedom and strength in our lives" (p. 124).

The history of flag desecration in Germany is set out in the Appendix to *Washington* v. *Turner*, Supreme Court of Washington, September 3, 1970. (Reproduced in Appellant's Supplemental Appendix at Supp. App. pp. 27a-39a.)

[7] "In my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression. Moreover, . . . I believe, as a teacher, that the people do need novels and dramas and paintings and poems 'because they will be called upon to vote.' The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned." Meikeljohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 266.

POINT II

Appellee's contention that the flag statute is not void for vagueness or overbreadth.

Appellee argues that the phrase "publicly . . . cast contempt upon" the American flag is not vague, that reasonable men know what it means, and that there is nothing vague about the statutory definition of a flag. But the very cases cited by appellee in the footnote on page 42 and elsewhere in its brief indicate that reasonable men—state prosecutors and judges of the Federal courts—find "casting contempt" vague and overbroad and also disagree as to what is within the definition of flag in the statute.

Thus in *Long Island Vietnam Moratorium Comm.* v. *Cahn*, —— F.2d —— (2d Cir., Slip. Opn. 328, Dec. 24, 1970) the Court of Appeals for the Second Circuit found another subdivision of New York's flag statute, section 13C(a) New York General Business Law (formerly subparagraph a of subdivision 16 of section 1425 of the Penal Law) unconstitutional. In that case two members of the three-judge court below had ruled that the representation which was the basis of the threatened prosecution was not a flag as defined in the statute and so did not reach the constitutional issue. Yet the three members of the Circuit Court held that it was within the statutory definition of "flag" and proceeded to the constitutional question.

In *Crosson* v. *Silver*, —— F. Supp. ——, No. —— Civil 70-79, Tucson (D. Arizona, Nov. 13, 1970) a three-judge court considered the constitutionality of Arizona's flag desecration statute (A.R.S. § 41-793(C). 1956) which is substantially the same as New York's and includes an almost

identical definition of flag. The court was asked to enjoin a prosecution for flag burning, with intent to cast contempt upon the flag, at a public meeting where the flag and the foreign policy of the United States were attacked.

Speaking of the provision against any "act [which] casts contempt" in that statute, the three-judge court held that such a prohibition was not limited to "acts the doing of which the legislature may validly prohibit." "Contempt," it said, would describe acts such as sticking out one's tongue, turning one's thumbs downward, or raising a clenched fist salute.

Ruling that the statute is unconstitutional, the *Crosson* court said:

> "The 'contempt' portion of § 41-793 (C) would prohibit the doing of all such acts. Yet these acts, which are clearly symbolic speech, do not affect the only legitimate state interest underlying such a prohibition. Even assuming there are acts of contempt which, when directed toward the flag, are inherently inflammatory, the prohibition against 'acts [which] cast contempt' by its terms proscribes substantially more than is necessary to protect the state's interest; and that which is unnecessarily proscribed includes protected symbolic speech. Since we cannot see that any limiting construction short of excision can cure the defect,[8] this portion of § 41-793 (C) must be struck down as unconstitutionally overbroad. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)."

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[8] See *Harrison* v. *NAACP*, 360 U.S. 167 (1959). It will not suffice that the state may decline to prosecute relatively trivial acts of contempt. The hazard of prosecution and consequent chilling effect remains. *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964)."

Rejecting the possibility of saving that part of the statute which referred to the physical acts of mutilation, etc., the Court in *Crosson* said:

> "It may be argued that the statute is disjunctive and thus severable, and that we should approve the 'mutilate, deface, defile, or trample upon' portion. However, we find that these terms, when juxtaposed against the definition of 'flag' in § 71-793 (D), lose whatever susceptibility to a properly narrow application they may have had standing alone."

Appellee describes appellant's claim that the definition of an American flag in the statute is vague, as frivolous because "appellant was convicted for contemptuous use of an actual flag" (p. 43, Appellee's Brief). That argument is irrelevant. As was said in *People* v. *Bookcase, Inc.*, 14 N.Y.2d 409, 418 (1964) " . . . the constitutionality of a statute governing publications is to be tested by what can be done under it and not by the particular violation which is charged with having occurred."

Mr. Justice White, responding to a similar argument in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) stated:

> "The State labels as wholly fanciful the suggested possible coverage of [the statute] . . . It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U.S. at 373.[8]

[8] Unfortunately, many overbroad applications of New York's flag statute have not ended as happily as appellee would have this

over, the argument that an "actual" flag was used is t factually accurate. The police officer who was te's sole witness was able to testify only that: "These to be flags of the United States Government" (A. There was no testimony that "actual" flags were he word "flag" has been used generally in this case defined in the statute. However, Chief Judge Fuld issent (A. 18a) was careful to refer to the construc- by an artist named Marc Morrel, in which the lat- le use of American flags—or what appeared to be f such flags." (26 N.Y.2d at 125.)

llee argues that appellant may not claim uncon- nal overbreadth because his conduct would be pro- under any construction of the statute. Assuming *lo* that appellant's exhibition could be barred under wly drawn statute, a statute which is overbroad is itutional on its face and is therefore invalid for poses. Thus, this Court has reversed convictions statutes found to be overbroad in cases where the in issue could have been regulated under a nar- drawn statute. *Kunz* v. *New York,* 340 U.S. 290 *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Ap-* v. *Secy. of State,* 378 U.S. 500 (1964).

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elieve. See Appellee's Brief, footnote to page 42. Six College students were successfuly prosecuted for washing in public. *Rochester Democrat and Chronicle,* March 15, 3B. Leonard A. Goodell, who lived in a "hippy house" esburg, New York, served 10 days in jail for flag desecra- en State Troopers arrested him for replacing the stars on emade flag with a peace symbol. *Schenectady Gazette,* June p. 27. Allen Smith was not as fortunate as Fred Pregaskis convicted of driving a car contemptuous of the flag because painted red, white and blue. *Associated Press Dispatch,* New York, January 31, 1970.

In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), Mr. Justice Murphy, speaking for the Court, rejected the argument that an overbroad statute may not be challenged in such a case:

> "An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him." (310 U.S. at 98.)

And in his concurring opinion in *Niemotko* v. *Maryland*, 340 U.S. 268, 273 (1951), Mr. Justice Frankfurter discussed a claim of unconstitutionality for vagueness by an allegedly "hard core" offender:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action is taken." 340 U.S. at 285.

See also, *Crosson* v. *Silver*, *supra*.

Appellee also argues that there is no overbreadth in the New York Court of Appeals holding that the statute requires no finding of intent, despite the basic rule, as pointed out by Chief Judge Fuld in his dissent, that *malum prohibitum* cannot be invoked in a "case where the challenged conduct involves the expression of political views" (A. 21a-22a); 26 N.Y.2d at 128. Appellee cites as an authority for its view *State* v. *Schlueter*, 127 N.J.L. 496, 23 A.2d 249 (N.J. 1941), but it fails to mention that the trial court in *Schlueter* had specifically charged the jury that it could

only if the defendant committed the offense charged vil intent" (23 A.2d at 251).

ie same effect is *State of Washington* v. *Floyd Turner, Jr.*, decided by the Supreme Court of that banc (No. 40096, Opinion by Hale, J. filed Sept. 3, That case was a prosecution for participation in a ning, where the trial court had charged the jury ieed not find that the defendant intended to violate The prosecution was brought under the Uniform w (Washington Laws of 1919, ch. 107, p. 259, RCW hich is almost identical to the statute under which has been convicted. The Washington Supreme eversed the conviction on the ground that the charge rror. It said that the conduct covered by Washing- g desecration statute was not *malum prohibitum* but *per se;* that "to defile or hold up to contempt" is involving moral turpitude, and to sustain a con- intent must be shown. The court therefore avoided stitutional question.

lee's Brief (p. 46) also suggests that it is not t the New York Court of Appeals was ever prop- sented with "a question of overbreadth as to the covered" and (p. 16) that appellant is complain- the first time in this Court, that the statute might ed to persons other than himself, whose conduct, nnorthodox gestures toward the flag, may be con- ally protected." The facts are otherwise.

motion to dismiss at the close of People's case, or appellant said:

We say, furthermore, this section, subdivision 16 425 is unconstitutionally vague, and it is, your

Honors, it is a fantastic statute for vagueness. For example, the statute prohibits the defacing, contempt by word or act. This is language which describes attitudes which could be communicated by any kind of conduct, any kind of gesture. For example, thumbing one's nose, would this be contempt, something that is forbidden? Similarly, what is a flag? In here it's defined in the broadest possible terms . . . ." (A. 61a).

And at A. 66a appellant's counsel argued that the constitutionality of the statute "should be tested by what can be done under it and not by the particular violation which is charged with having occurred."

The same argument was made at page 25 of Appellant's Brief to the Court of Appeals, and it was amplified at great length at pages 26-29 of appellant's brief to the Court of Appeals.*

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* Pages 26-29 of Appellant's Court of Appeals brief read:

"Statutes must provide standards for enforcement; they may not be worded so broadly as to enable public officials to determine which activities will be permitted and which prohibited by selective enforcement. *Giacco* v. *State of Pennsylvania*, 382 U.S. 399; *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87; *Cox* v. *State of Louisiana*, 379 U.S. 536.

"In *Cox*, the purpose of one of the statutes involved was clearly valid: it prohibited the obstruction of public passages. But neither the statute, nor any administrative regulations provided standards for its application. The unbridled discretion thus given enforcement officials endangered the right of persons to equal protection of the laws. And because the conduct controlled by the statute was used to communicate ideas, the unfettered discretion of the authorities allowed them 'to determine which expressions of view will be permitted, and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.' *Cox* v. *Louisiana*, 379 U.S. at 556.

"In the *Giacco* case, a Pennsylvania statute authorized juries to assess costs against acquitted defendants. There were no stand-

Furthermore, there was a separate point made in appellant's Court of Appeals brief that intent was a necessary element for a conviction in all cases involving the First Amendment, and that no intent was established; that, indeed, the appellant had no intent to be contemptuous of the flag (A. 82a) and that he believed the artist was not

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ards in the statute but the State contended that court interpretations required that defendant's conduct be '"reprehensible in some respect" "improper", outrageous to "morality and injustice" * * *' before costs could be assessed. The Supreme Court held the act constitutionally invalid, as written and as interpreted, because of the absence of sufficient standards to guide the jury.

"The language of subdivision 16 of Section 1425 of the Penal Code is as subjective and imprecise as the standards of the Pennsylvania courts and permits similar uneven enforcement of the statute.

"It is submitted that subdivision 16 of Section 1425 of the Penal Law gives the same uncontrolled discretion to the authorities as to the *Louisiana* and *Pennsylvania* statutes. Moreover, its broad scope covers activities that are constitutionally protected free speech. *Stromberg* v. *California*, 283 U.S. 359.

"The *Stromberg* case held that a statute, vague and indefinite on its face, cannot be employed to abridge free speech guarantees of the Constitution. For the reasons stated in *Stromberg*, ambiguity or vagueness has not been tolerated in statutes regulating publications and motion pictures. *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684; *People* v. *Bookcase, Inc.*, 14 N.Y.2d 409.

"In *People* v. *Bookcase, Inc.*, *supra*, this Court invalidated Section 484-h of the Penal Law on the ground that the words 'exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality' were unconstitutionally vague. The Court said: '. . . the constitutionality of a statute governing publications is to be tested by what can be done under it and not by the particular violation which is charged with having occurred' (14 N.Y.2d at p. 418).

"It is submitted that the words of subdivision 16 of Section 1425 of the Penal Law, cannot be upheld. They ban the expression of subjective attitudes such as 'defiance' and 'contempt' but the statute fails to define those terms."

being disrespectful of the flag but was questioning the acts of the government and of others.

It is therefore clear that the issue of overbreadth was before the trial court and before the Court of Appeals. Appellee as well as appellant have intertwined their arguments with respect to vagueness and overbreadth. For, "As Mr. Justice Harlan pointed out in *Zwickler*, overbreadth and vagueness are not always easy or profitable to distinguish. 389 U.S. at 255-257 (concurring opinion). Statutes which suffer from one often suffer from the other." *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 532 (D. Del. 1970), with a footnote to *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 871-76 (1970).

POINT III

Appellee's contention that the statute does not deny appellant equal protection because it permits only non-contemptuous use of the flag when disconnected from advertisements.

Appellee argues that the exception in the statute for uses of the flag in pictures, newspapers and periodicals is intended to permit only "non-contemptuous" use of the flag for those purposes, so that there is no discrimination against sculptors or against art gallery proprietors who exhibit sculpture as compared with those who exhibit paintings or as compared with publishers of newspapers or periodicals who show many cartoons[10] and pictures using the

[10] In the appendix hereto we show two examples of a genre of newspaper editorial cartoon which utilizes the flag to comment on government action in much the same fashion as the sculptures in this case (Nos. 35a, 37a).

flag, including photographs of these sculptures. There is nothing to support this in the exemption language of the statute or in the way the statute has been applied.

As the Court of Appeals stated in *Long Island Vietnam Moratorium Comm., supra*, "Although the courts should try, whenever possible, to construe statutes to avoid a constitutional infirmity, they may not, in doing so, rewrite the statute or do violence to its plain language" (—— F.2d ——). (Supp. App. to Reply Brief 8a.) Significantly, on the trial of the case, appellee conceded that if the art work had been in the form of a painting rather than a sculpture, it would have been exempt from the statute (A. 71a).

There is nothing in the language of the statute that limits the exemption to non-contemptuous use of the flag, nor did the New York Court of Appeals so find (A. 17a). On the other hand, the limitation to a use disconnected from any advertisement is explicit. The exemptions of subdivision 16 apply to all seven of its lettered subdivisions. These include the placing of a mark or design on the flag, such as a peace symbol (subparagraph a, held unconstitutional in *Long Island Vietnam Moratorium Comm.* v. *Cahn, supra*); subparagraph b. (printing a representation of a flag on any article "to decorate, mark or distinguish it"); subparagraph d, which is at issue here; and subparagraphs e, f and g.

Furthermore, the statute has never, to our knowledge, been applied to paintings, newspapers or periodicals. The Morrel exhibit at appellant's gallery included three paintings that used an American flag or an American flag motif, one of them a painting of the sculpture hanging from a noose in the gallery window (A. 79a), but these paintings

were not included in the complaint. Life Magazine printed a color photograph of this same hanging sculpture (Defendant's Exhibit A). Exhibit C shows other uses of the flag in painting and a periodical. And the Appendix to this reply brief includes magazine reproductions, editorial cartoons and many other paintings using a flag motif, including a collage which is in the collection of the Governor of the State of New York, composed of a flag upon which have been imposed potatoes, the words "Use Fork," "Idaho" and "New York," as well as a picture of Governor Rockefeller. This painting was reproduced on the cover of the New York Times Magazine prior to the sentencing of the appellant, and at the time of sentencing it was being shown in an art exhibit in New York City which was widely advertised by reproductions of this same painting. (Appendix hereto, No. 5a.)

Other examples in the appendix hereto show the flag distorted in posters and buttons on which have been imposed the faces of candidates for public office (Nos. 25a, 27a, 31a); used as the motif for women's clothing (43a); wrapped around an oil can or as the trunk of a tree whose roots, the stripes, are overrunning other countries. (Nos. 35a, 37a.)

There is thus no basis for reading into the exemption a limitation that the use must be non-contemptuous, nor do the uses that occur daily in painting and in periodicals indicate that lack of contempt has been a guideline to application of the exemption in the enforcement of the statute. The statute therefore denies appellant equal protection of the law.

POINT IV

Appellant has been prosecuted and convicted for the communication of ideas, and such a conviction cannot stand under the First Amendment.

Chief Judge Fuld, who wrote for the New York Court of Appeals in the *Street* case, succinctly summed up the case against appellant in his dissent:

> "This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street*, and may not be constitutionally sustained." (A. 22a; 26 N.Y.2d at 129.)

Chief Judge Lumbard noted in *Long Island Vietnam Moratorium Committee* v. *Cahn*, *supra*, that the statute, in effect, "requires worship of the flag by compelling a series of taboos concerning the flag display." (Supplemental App. of Unreported Cases, at 11a-12a.)

It is well known that in many primitive societies, symbols originally designed to represent a tribe and its values, gradually evolve into independent objects of veneration, existing apart from—and often at variance with—the values they were originally designed to represent. Steiner, *Taboo* (Penguin Book, 1967); Frazer, *The Golden Bough* (MacMillan & Co., Ltd., 1963), Chapters XIX-XXIII. See also, Freud, *Totem and Taboo* (W. W. Norton & Co., 1950).

Stated simply, the issue before this Court is whether our flag, originally designed to symbolize our heritage of freedom, has now become a totem whose worship can curb the very freedom it is supposed to represent.

CONCLUSION

For the reasons set forth above the statute in question should be declared unconstitutional and the appellant's conviction reversed.

Respectfully submitted,

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APPENDICES

APPENDIX I

A Brief Compendium of the Use of the American Flag by Contemporary Artists

WILLIAM K. ROBERTS — "Use Fork, New York—Idaho Up"
Oil and collage—1965
Collection: Governor Nelson A. Rockefeller

"Use Fork, New York—Idaho Up" currently hangs in the Executive Mansion in Albany, New York. It was exhibited in New York City at the New School for Social Research during May, 1967, in connection with a general exhibition entitled "Governor Rockefeller's Collection From the Albany Mansion." In connection with the exhibition, the work was reproduced as the cover of the New York Times Magazine for April, 1967, and the attention of the Court is respectfully invited to that cover for a full color reproduction of Roberts' work.

RED GROOMS — "Patriot's Parade #2"
Wood construction—1967

Red Grooms was chosen by the American Federation of Arts as one of a group of contemporary American artists, including Marc Morrel, the artist whose works are at issue herein, to illustrate the increasing use of patriotic images in American art. The exhibition, entitled "Patriotic Images in American Art", was exhibited nationally by the American Federation of Arts from October 1968-October 1969. See, *Catalogue of the American Federation of Arts* 1969-70, Exhibit #68-3, p. 47.

ROBERT WEAVER — "Reform Administration"
Collage—undated

"Reform Administration" is one of a series of collages by Robert Weaver prominently utilizing the American flag as an artistic and political image. Weaver's collages have attained national recognition.

4. SAM BERMAN — "Spiro T. Agnew" from "Caricatures of Six Leaders"— Ceramic construction—1969

Sam Berman is one of America's foremost political caricaturi and three dimensional cartographers. His works have been pho graphed in full color in Volume 5, Number 3, Issue 19 of Lithopi ion, the graphic arts and public affairs of Local One of the Amal mated Lithographers of America.

5. PAUL VON RINGELHEIM — "See the USA" Collage: fabric, acrylic on canvas—1968

Paul von Ringelheim's work was selected by the American Feder tion of Arts for inclusion in the exhibition entitled "Patrio Images in American Art" which was exhibited nationally betwe October 1968-October 1969.

6. JASPER JOHNS — "Three Flags"— encaustic on canvas—1958 Collection of Mr. & Mrs. Burton Tremain

Jasper Johns is perhaps the best known exponent of use of t American flag as a medium of artistic expression. "Flag Orange Field"—1957 and "White Flag"—1955-1958 are also amo his flag paintings.

7. TONY PALLADINO — "Italo-American Flag" wooden construction—undated

"Italo-American Flag" is Tony Palladino's attempt to expre visually his sense of the blending of cultures which characteri much of the American experience.

8. RUDOLPH DE HARAK — Untitled etching—1961

de Harak's etching was reproduced as the cover of "Print" America's Graphic Design Magazine, May/June, 1961.

UNKNOWN — Cover—Look Magazine, July 15, 1969

UNKNOWN — Cover—Life Magazine, Jan. 8, 1971

The use of the flag as an artistic vehicle has not been confined to *avant garde* artists. In the commercial art area, the American flag has been consistently utilized as an eye-catching device for the effective transmission of a message. The covers of two of the largest mass circulation periodicals in America reflect the widespread use of flag art.

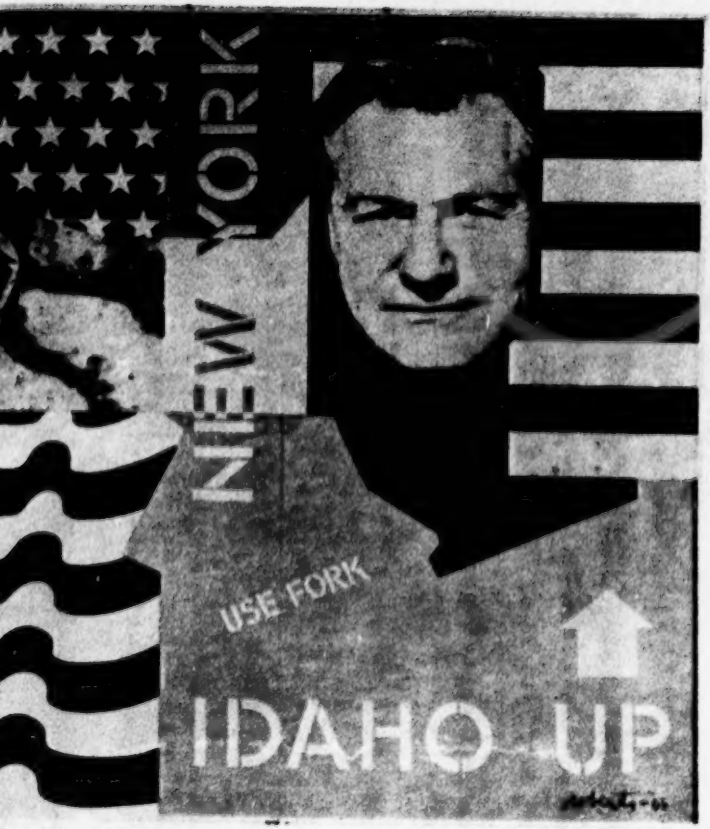
In connection with an extraordinarily vivid exhibition of protest art entitled "Contemporary Graphic Art in Contemporary Law and Justice", marking the Centennial Year of the Association of the Bar of the City of New York, William Weege, a Professor of Art at the University of Wisconsin, exhibited as a silk-screen print entitled "Law and Order" in which the flag is artistically utilized. The artist is currently travelling in Italy and counsel have been unable to contact him in order to secure his permission to reproduce the work. Permission has been denied by his agent because of the pall of fear which the prosecution of Steven Radich has thrown over segments of the artistic community.

The attention of the Court is invited to the Catalogue of the exhibition, which was on view during April, 1970 at the House of the Association of the Bar of the City of New York.

["USE FORK, NEW YORK—IDAHO UP"]
Oil and Collage by William K. Roberts

(See opposite) ☞

4. William K.



berts: Use Fork, New York - Idaho Up

["Use Fork, New York—Idaho Up"]
Oil and Collage by William K. Roberts

(See opposite) ☞

4. William K. Roberts - Use Fork, New York - Idaho Up

["Patriot's Parade #2"]
Wood Construction by Red Grooms

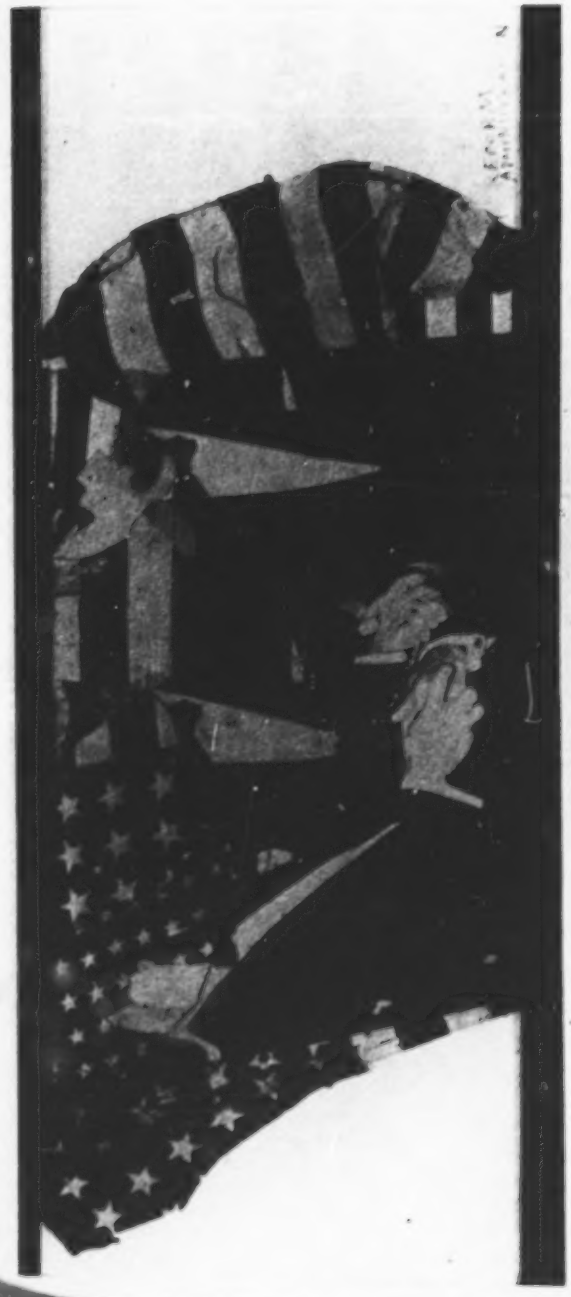
(See opposite) ☞

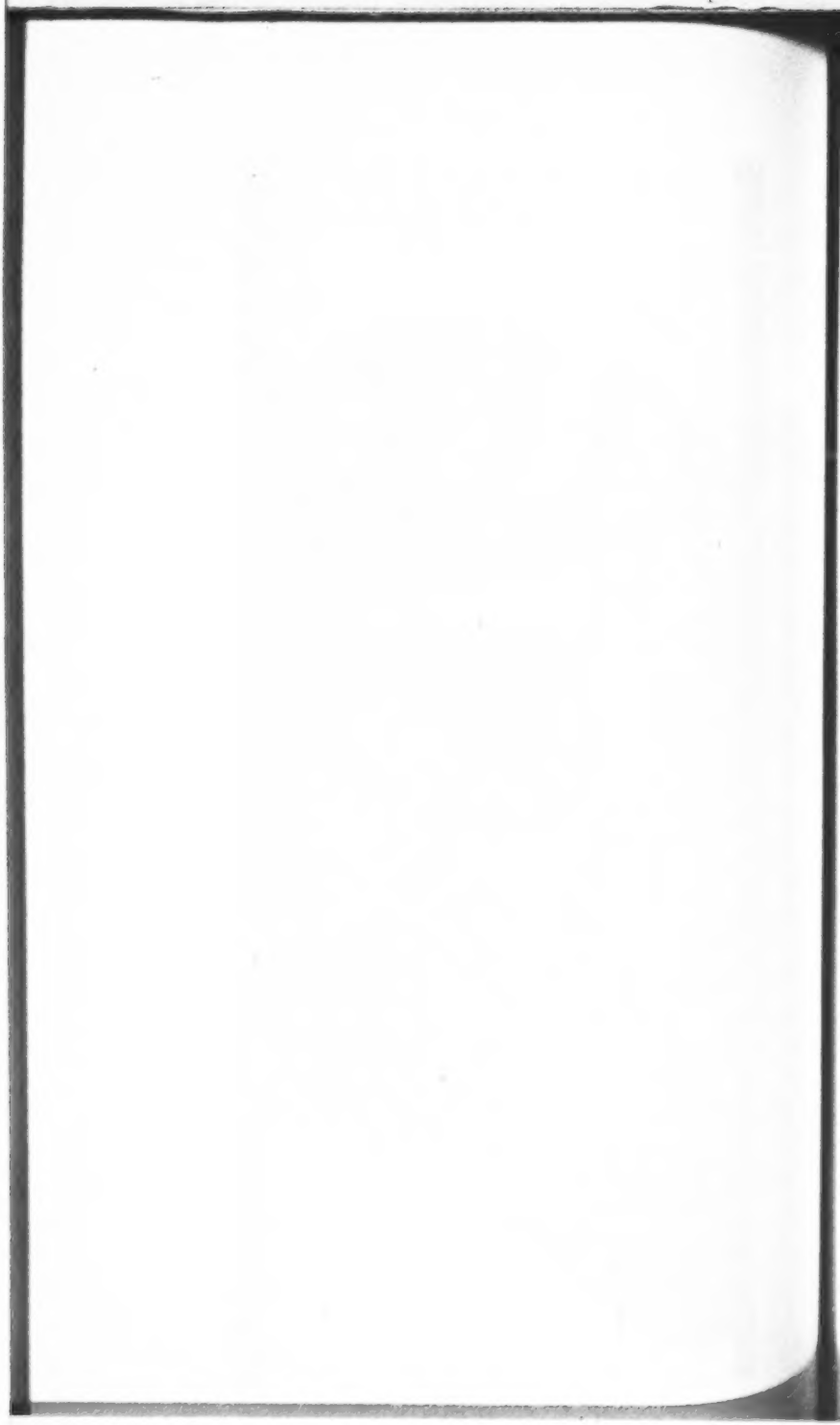
MISS NAPALM

8a

["Reform Administration"]
Collage by Robert Weaver

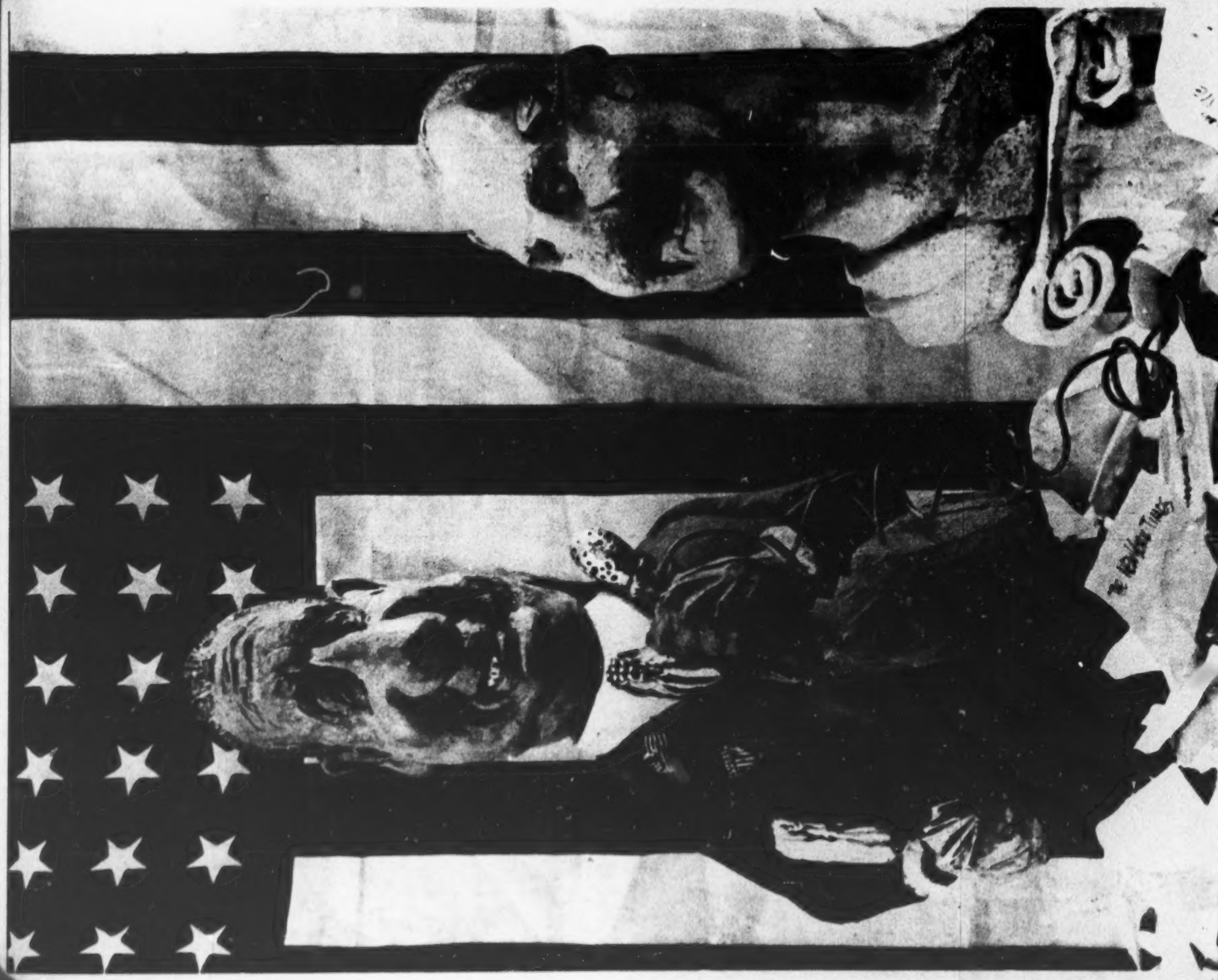
(See opposite) ☞





SPIRO T. AGNEW" FROM "CARICATURES OF SIX LEADERS"]
Ceramic Construction by Sam Berman

(See opposite) ☞



12a

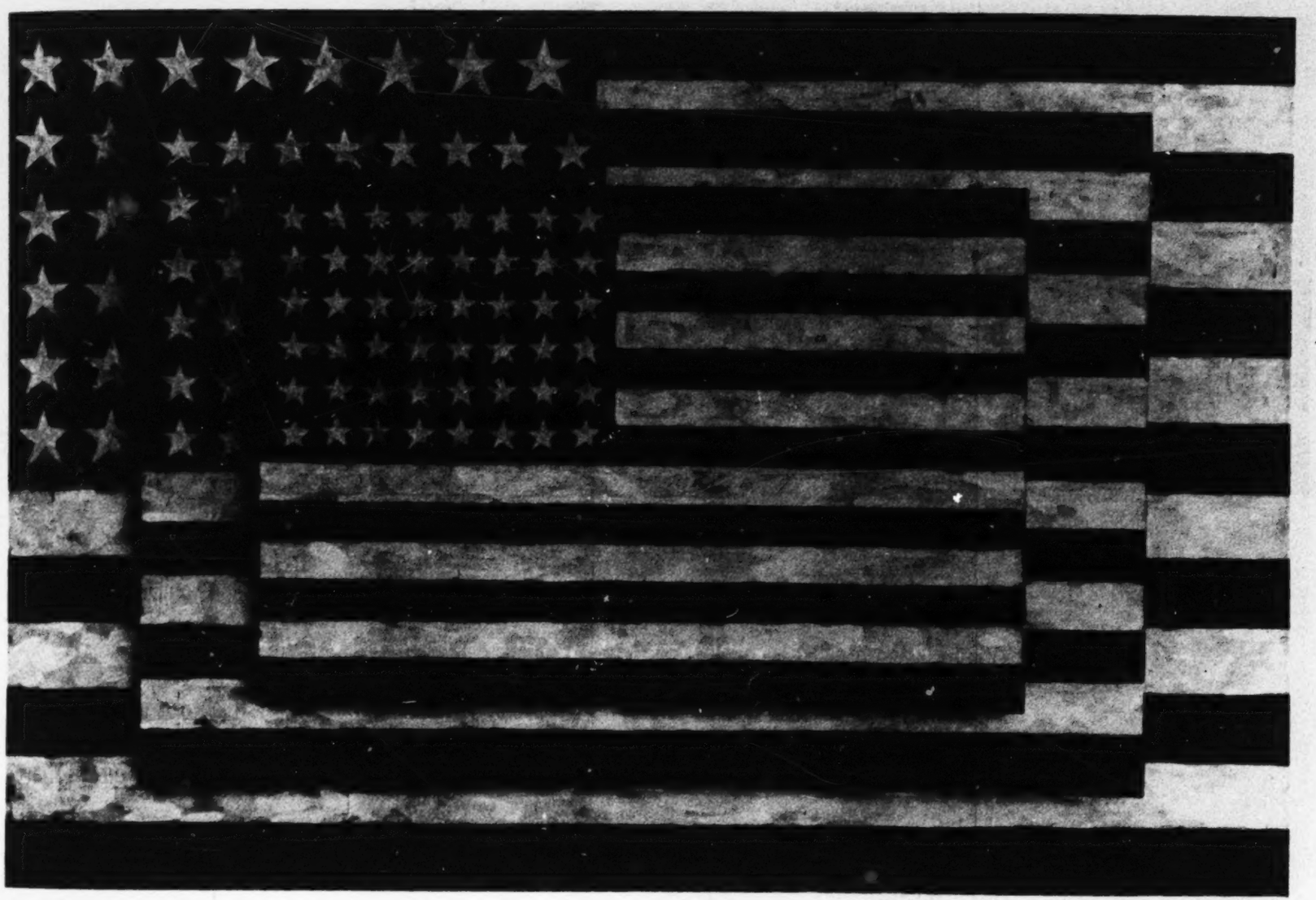
["See the USA"]
Collage by Paul von Ringelheim

(See opposite) ☞

14a

["Three Flags"]
ainting by Jasper Johns

(See opposite) ☞



["Italo-American Flag"]
Wood Construction by Tony Palladino

(See opposite) ☞

[Untitled Etching—1961]
by Rudolph de Harak

(See opposite) ☞

20a

[Cover—Look Magazine]
July 15, 1969

(See opposite) ☞

22a

[Cover—Life Magazine]
January 8, 1971

(See opposite) ☞

LIFE
The New Shape of America
A Cross-Country Look
The Four-Day Work Week
Our Public Lands Up for Grabs
The Good Life in New Towns
What Makes Us Laugh
The Un-Radical Young
TWO-IN-ONE ISSUE 60 CENTS

APPENDIX II

A Brief Survey of the Use of the American Flag as an Aid in the Dissemination of Political Ideas

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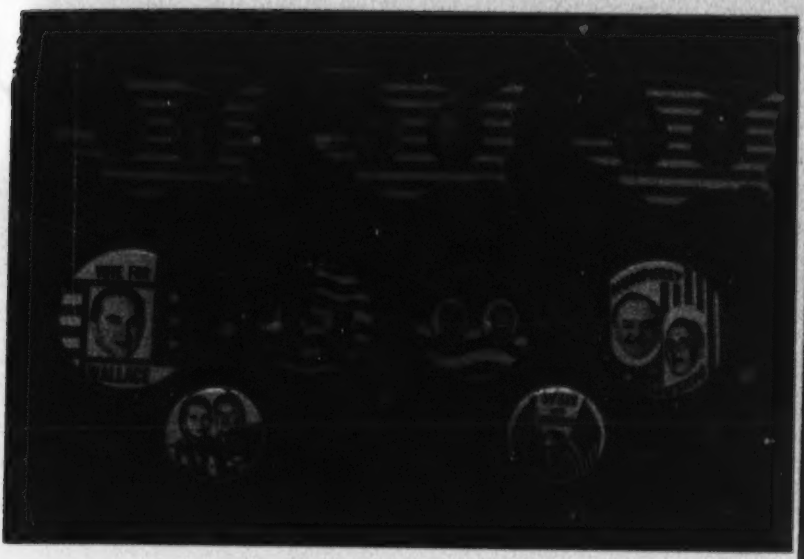
[USE OF THE AMERICAN FLAG DURING THE 1968 PRESIDENTIAL CAMPAIGN]

(See opposite) ☞

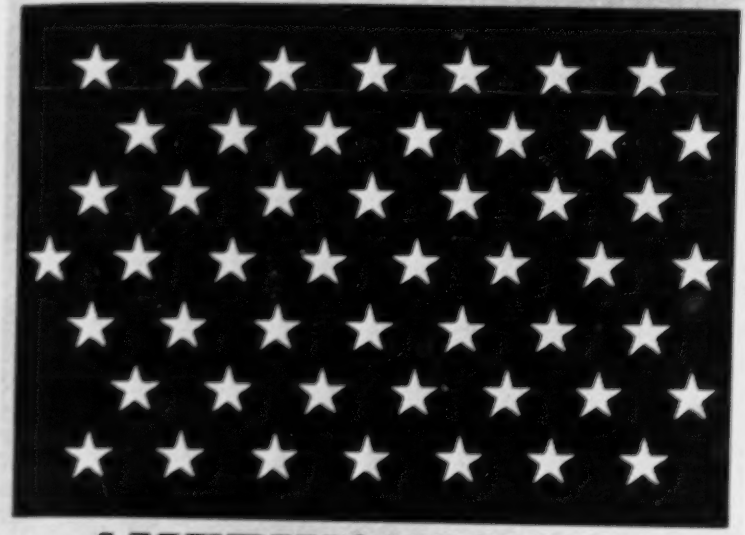


[NIXON-AGNEW CAMPAIGN BUTTON—1968]

(See opposite) ☞

[USIA Poster—Moscow 1959]

(See opposite) ☞



АМЕРИКАНСКАЯ

ВЫСТАВКА

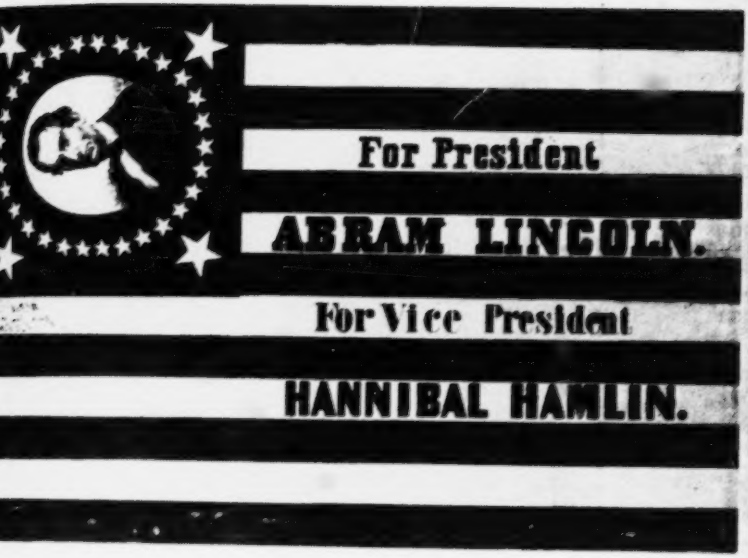
В ПАРКЕ «СОКОЛЬНИКИ»

МОСКВА. 25-го ИЮЛЯ—1-го СЕНТЯБРЯ 1939 г.
ОТКРЫТА ЕЖЕДНЕВНО с 11.00 до 22.00 час.

Билеты продаются в театральных кассах и в кассах при входах в парк «Сокольники»
Входная плата для взрослых—1 руб., для детей и рядовых военнослужащих—50 коп.

[Lincoln-Hamlin Campaign Banner—1864]

(See opposite) ☞


For President
ABRAM LINCOLN.
For Vice President
HANNIBAL HAMLIN.

[CAMPAIGN BANNER—"KNOW NOTHINGS"—1844]

(See opposite) ☞

NATIVE.AMERICANS.
BEWARE OF
FOREIGN.INFLUENCE

["CAMOUFLAGE"—*Engelhardt, The St. Louis Post-Dispatch*]

(See opposite) ☞

OIL
INDUSTRY
PROFITS
'NATIONAL
SECURITY'
RT
OTAS

[BILL MAULDIN'S CARTOON IN *New Republic*, JANUARY 9, 1971, p. 25]

(See opposite) ☞

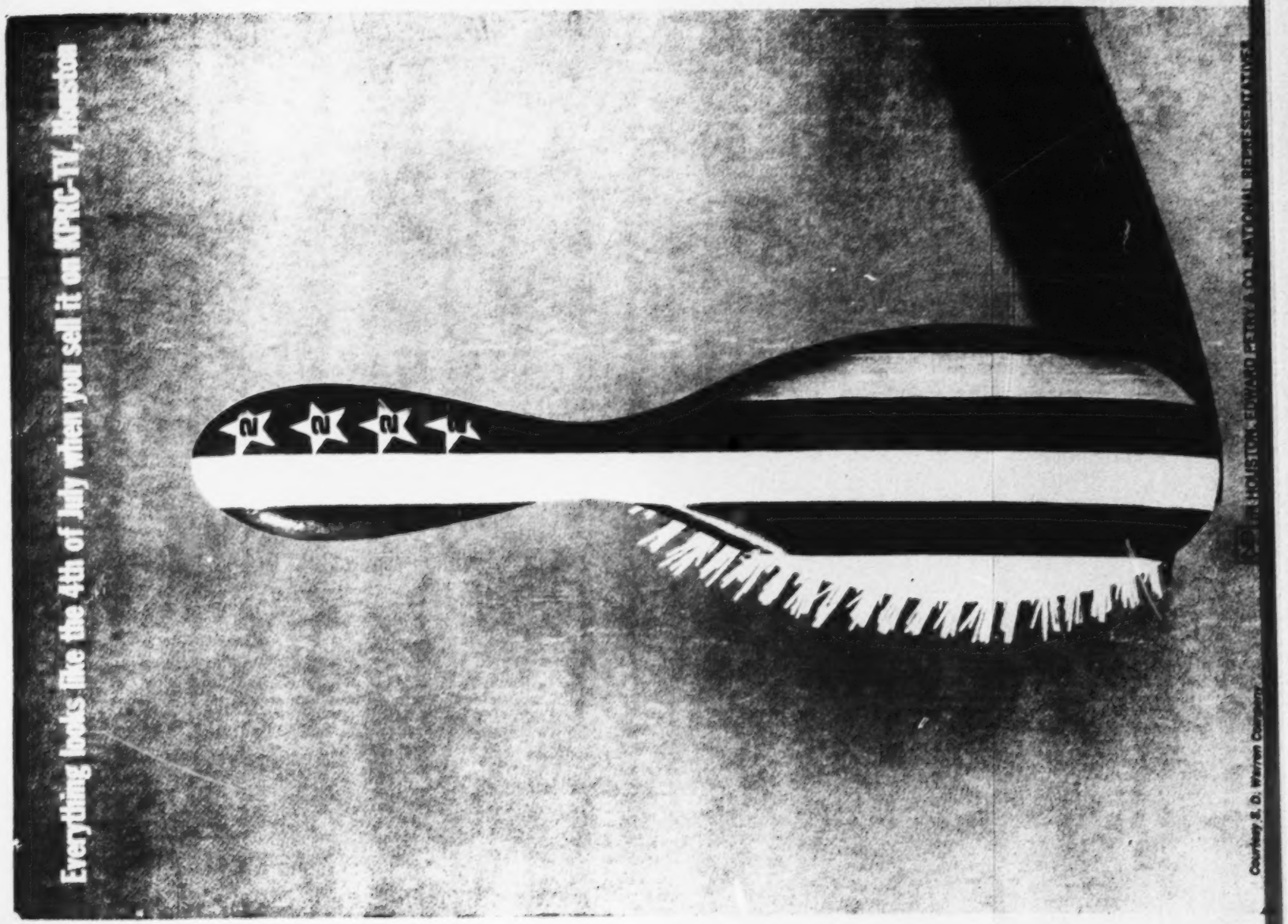
"It's become almost indigenous."

APPENDIX III

Examples of the Commercial Use of the American Flag

[ADVERTISEMENT FOR KPRC-TV IN *Broadcasting Magazine*, JULY 3, 1967]

(See opposite) ☞



[Advertisement for Vaco Products, Inc. in *Look Magazine*, October 7, 1969]

(See opposite) ☞

JOIN THE TOOL REVOLUTION!

Vaco says down with dull tools

Sure, your great grandfather was a fine craftsman. But do you have to use the same kind of monotonous old tools he did? Vaco says no! Tools must keep up with the times! And Vaco sees that they do! We design tools to solve new problems. Tools that make work easier and maybe even put a little fun in it.

Drive onward

Vaco didn't invent the screwdriver, but we've made a lot of improvements on it. Like our famous Screw Launcher. For spots you can only reach with one hand . . . or spots where you need one hand to hold on to something.

We also make Screw Launchers for Phillips head screws, and very tiny screwdrivers and giant screwdrivers and everything in between. We even have Reversibles with a slotted blade on one end and a Phillips on the other. And then we have screwdrivers with handles that light up for circuit testing.

Wrench free

Put a Vaco Plierench (like the one above) in your hip pocket, and there's a whole tool box of stuff you don't have to lug around. Because this one tool is a plier, a monkey wrench, a pipe wrench, a ratchet wrench, an end wrench. It comes with extra jaws (instantly interchangeable) for longer reach and for inside gripping. The jaws stay parallel in all positions and the Plierench has gears which multiply your hand power to a ton of gripping pressure. Yet with all this power, it treats smooth surfaces as gently as velvet. The Plierench has comfort grip handles so you don't even have to worry about blisters. Vaco has finally come to grips with the problems of America's handyman and mechanic!

Riveters arise

It wasn't long ago that the only blind rivet gun used anywhere was on a factory assembly line. Now you can buy the Vaco Pow'r-Riveter. A real heavy-duty tool. And Vaco Pow'Rivets . . . the first foolproof, goofproof rivets that are guaranteed to clamp up tight — dust-tight and water-tight — every time, even in oversize holes.

Here's another smart tool . . . a self-adjusting nutdriver that fits seven bolt sizes so you don't have to keep reaching for different drivers for different size nuts. It's pretty ingenious. These Vaco drivers start a tool revolution all by themselves. But there's more.

Remember the bolt

Here's the tool that makes solderless terminals a real joy to work with. It not only crimps the terminals, with or without insulators on them, but cleanly strips all common wire sizes. It does something else that comes in pretty handy too. It cuts six different sizes of bolts. So clean you don't have to touch a file to them. Try that with a hacksaw.

Maybe all you want is a Wire Stripper. One that's extra easy to work with. This is it. Dial-A-Gauge. Turn the cam and strip wire all day with never a nick.

Go with VACO

To wrap it all up, every tool that Vaco makes is absolutely, positively and unconditionally guaranteed. Forever.

And you can't get much more revolutionary than that.

VACO Products Co., Chicago, Ill. 60610

See the tool revolution where you see this poster

[Illustration of Flag Fashion from *Women's Wear Daily*, April 17, 1970]

(See opposite) ☞

FLAG FASHION

WOMEN'S WEAR DAILY, FRIDAY, APRIL 17, 1970

FILE COPY

APR 19 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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Attorneys for Appellant

JURISDICTIONAL STATEMENT FILED MAY 18, 1970
PROBABLE JURISDICTION NOTED OCTOBER 19, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

Stephen Radich, the petitioner herein, respectfully ves this Court for an order (1) vacating its affirmance the decision below by an equally divided Court and (2) tting the instant case for reargument. As grounds for s motion, petitioner states the following:

I.

Petitioner suggests that it would be appropriate for e entire Court to participate in the consideration and cision of this case.

Petitioner's conviction for casting contempt upon the nerican flag was affirmed by an equally divided Court March 24, 1971. Mr. Justice Douglas took no part in e consideration or decision of the case.

Petitioner is unaware of the basis for Mr. Justice Douglas' conclusion that his participation in the consideration or decision of this case would be inappropriate. However, it has been suggested that Mr. Justice Douglas' abstention might have stemmed from a reluctance to sit on cases involving those accused of flag desecration because he had publicly expressed personal disapproval of them. Petitioner respectfully suggests that such an expression of personal disapproval does not require his disqualification, and earnestly requests that this case be rescheduled for argument before the entire Court. Petitioner has no doubts whatever concerning the ability of any member of this Court to dissociate his personal beliefs from his view of the merits of a given constitutional issue. Petitioner has faith in Mr. Justice Douglas' ability to render dispassionate justice in this case.

Disposition of a criminal appeal raising serious constitutional questions by an equally divided Court is, we believe, an unsatisfactory method of dispensing justice. In such case it is not unprecedented for reargument to be granted by the entire Court including the Justice who initially did not participate. E.g. *Bartkus* v. *Illinois*, 355 U.S. 281 (1958), rehearing granted, 356 U.S. 969 (1958), conviction affirmed, 359 U.S. 121 (1959); *Ladner* v. *United States*, 355 U.S. 282 (1958), rehearing granted, 356 U.S. 969 (1958), conviction reversed, 358 U.S. 169 (1958).

In *Bartkus* and *Ladner*, Mr. Justice Brennan did not participate in the initial affirmance of the respective convictions by an equally divided Court, because he had been a member of the Court below in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), a companion case raising similar issues

of double jeopardy. Once *Hoag* was decided, however, Mr. Justice Brennan participated in the subsequent reargu-ments and opinions in *Bartkus* and *Ladner,* thereby permitting the Court to dispose of those cases by a majority vote.

We recognize that in the cases cited above there was an intervening circumstance which does not exist in this case. However, a re-evaluation by Mr. Justice Douglas of his refusal to participate can serve the same function, thereby enabling the Court on rehearing to pass on the constitutional issues.

II.

Petitioner suggests that an equally divided Court should not result in the affirmance of a criminal conviction raising substantial constitutional issues.

Petitioner recognizes that this Court has affirmed the judgment of the lower court in those rare instances when it is equally divided on the merits of an appeal. E.g. *The Antelope,* 10 Wheat 66, 126 (1825); *Etting* v. *United States Bank,* 11 Wheat 59 (1826); *Durant* v. *Essex Company,* 7 Wall (U.S.) 107 (1868); *Hertz* v. *Woodman,* 218 U.S. 205 (1910); *United States* v. *Pink,* 315 U.S. 203 (1942); *Raley* v. *Ohio,* 360 U.S. 423 (1950); *Ohio ex rel. Eaton* v. *Price,* 364 U.S. 263 (1960); *In re Spencer* 397 U.S. 817 (1970). Although the divided affirmance result evolved in the context of civil litigation, it has been applied to criminal cases. Petitioner respectfully suggests that given the philosophical and jurisprudential concepts of our criminal law (Cf. *In re Winship,* 397 U.S. 358 (1970)), this Court should reconsider the effect of the Court's inability to reach a ma-

jority in those few criminal cases raising constitutional issues of such substance and difficulty that the Court is equally divided on their merits.

This Court has ruled that before the State may impose criminal sanctions upon an individual, it must convince the finder of fact of his guilt beyond a reasonable doubt. E.g. *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958); *In re Winship*, 397 U.S. 358 (1970). The purposes of requiring a reasonable doubt rule in a criminal case were eloquently summarized by Mr. Justice Brennan in *In re Winship*, *supra*, when he wrote:

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."
>
> • • • • •
>
> "Moreover . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363-4.

The underlying principle expressed in *Winship*, that the inertial benefit rest with the accused in criminal cases,

should be applicable to questions of law as well as issues of fact. Where the issues of law upon which guilt or innocence depend are so close that this Court is equally divided as to their proper resolution, we respectfully urge that fundamental fairness requires that the inertial benefit should rest with the accused and that the conviction should be reversed. Due regard for the "good name and freedom of every individual" and for the "moral force of the criminal law" demand that a criminal conviction which raises significant issues of constitutional law should be affirmed only when a majority of this Court concur.

CONCLUSION

For the reasons set forth above, petitioner prays that this Court grant rehearing of the order of affirmance of the Court of Appeals of the State of New York, vacate that order, and set the case for reargument.

Respectfully submitted,

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As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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